83-1253

No._____

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IN THE

Supreme Court of the United States

October Term, 1983

LAWRENCE D. MORRIS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

STANTON D. LEVENSON
1615 Frick Building
Pittsburgh, Pennsylvania 15219
(412) 355-0650
Attorney for Petitioner

Batavia Times Publishing Co.
Edward W. Shannon
Pittsburgh, Pa. (412) 881-7463

Questions Presented for Review

1. Was the Petitioner deprived of the effective assistance of counsel and of due process of law by the trial court's refusal to grant a reasonable continuance?

2. Should this Court establish a procedure to be used by the district courts when a defendant requests a severance and immunity for a codefendant and the codefendant refuses to testify during the *voir dire* except under a grant of immunity?

Parties

In the United States Court of Appeals for the Third Circuit, Norman Bialy, John Birch, Robert Walton and Thomas Desmond were also Appellants.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above case on November 28, 1983.

Citations to Opinions Below

The memorandum opinion of the Court of Appeals is not yet reported and is reprinted in Appendix.

Jurisdiction

The judgment of the Court of Appeals was entered on November 28, 1983. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

Statutes Involved

The statutory provisions involved are 18 U.S.C. §371, 18 U.S.C. §1341 and 18 U.S.C. §1343.

Statement of the Case

The Petitioner was indicted with seven other individuals and two corporations on one count of conspiracy (18 U.S.C. §371), seven counts of mail fraud (18 U.S.C. §1341) and twenty counts of wire fraud (18 U.S.C. §1343). Trial began before the Honorable District Judge Barron P. McCune and a jury on June 14, 1982. Immediately prior to jury selection, codefendants Hefner, Cochems and Hill pled guilty.

At trial, the government established that the American Coal Exchange (hereinafter referred to as "A.C.E.") was a Delaware corporation engaged in the business of selling cash coal contracts for deferred delivery. Petitioner Morris was its president. The First Fidelity Financial Corporation (hereinafter referred to as "First Fidelity") was also a Delaware corporation and was acting as a commission agent for A.C.E. in the sale of the coal contracts. Defendant Norman Bialy was its president. Defendant Robert Walton was the manager of the Pittsburgh office of First Fidelity. Defendant Thomas Desmond worked for A.C.E. as a coal broker, and Defendant John Birch worked in the Florida office of First Fidelity as a salesman.

First Fidelity employed numerous salesmen nationwide to sell the coal contracts for A.C.E. to individual investors. First Fidelity would provide the salesmen with the lead cards containing the names, addresses and phone numbers of prospective investors. The prospective investors were individuals who had indicated that they were interested in making investments. The salesmen would then phone the investors and explain how the investment worked.

It was the government's position that the investors were induced to purchase the contracts through a series of misrepresentations and omissions of material facts. To support its position, the government called twenty-three investors at trial.

Not one investor purchased a contract on the first call. Moreover, most contracts were not sold until the investors and the salesman had spoken between three and five separate times, often over a period of several weeks.

Almost all of the investors were well-educated, well-employed and had extensive prior investment experience. For example, Helen Snodgrass was a stock broker (A. 130a). Wayne Brillhart was a merger and acquisition consultant (A. 124a). Michael Keen was the business editor of a Florida newspaper (A. 133a). William Olander, a scientist with General Motors in Detroit, had previously invested hundreds of thousands of dollars in various investments (A. 125a). Charles Bailey was an engineer in the Missile Systems Division of Rockwell International (A. 136a).

Many of the investors conducted an independent investigation prior to purchasing a contract. Robert Horney and Ronald Hevener checked with the Better

Business Bureau. George Kelbert checked with his stock broker (A. 122a, 123a). Dr. Harold Kopp checked with Mellon Bank in Pittsburgh (A. 126a). Darryl Williams checked with Dun & Bradstreet and the Pittsburgh Chamber of Commerce (A. 127a, 128a). Mrs. Snodgrass checked with the Pennsylvania Attorney General's Office (A. 131a). James Sykora reviewed the contract with his attorney before signing it (A. 135a). Charles Bailey checked the coal specifications with a power company engineer (A. 137a).

After the government rested its case, the court dismissed Counts Three, Four, Five, Six, Eight, Fourteen, Fifteen and Twenty-three.

The Defendants contended that they had a legitimate plan to make money which was conceived and executed in good faith. In support of their position, the Defendants called numerous witnesses.

Defendant Birch testified in his own behalf. He stated that on occasion he heard First Fidelity salesmen make untrue statements. When he heard such statements, he "took action against it" (A. 138a-141a). He also heard Petitioner Morris and Defendant Bialy correct untrue statements made by salesmen and even heard them ask salesmen to leave for making such statements (A. 139a).

James L. Sharp, Jr. considered becoming a First Fidelity salesman. As a result, he went through training sessions conducted by Petitioner. He testified that Petitioner never asked him to do anything improper, did not instruct him to make any misrepresentations and was "emphatic" that no salesman was to make any misrepresentations (A. 142a, 143a).

Edward Lickley worked as a salesman for First Fidelity. He testified that he believed that everything he told prospective customers was true (A. 144a).

Gibson Reiss purchased a contract. He testified that the terms and conditions of the written contract were consistent with the oral representations made by the First Fidelity salesmen (A. 165a).

Robert Sutter, an accountant (A. 185a), purchased two contracts. He likewise testified that the terms and conditions in the written contracts were consistent with the oral representations made by the salesmen (A. 185a). He further testified that even knowing what he knows now, he would not hesitate to purchase the contracts again (A. 191a).

Joe T. Gregory, a coal miner from Manchester, Kentucky, testified as to the existence of a coal supply contract between his company and A.C.E. (A. 209a-211a).

Carl A. Parise, the corporate attorney for A.C.E. and First Fidelity, testified that during his representation of the corporations, he discovered nothing which caused him to believe that the Defendants had devised a scheme to defraud (A. 214a, 215a).

Petitioner also testified in his own behalf. He testified as to the background and formation of the corporations, the concept behind the investment, and the training of the salesmen. He also testified that in addition to the Gregory coal supply contract, on February 12, 1981, A.C.E. and the United Continental Coal Company entered into a coal supply contract. That contract was admitted into evidence as Defendants' Exhibit "F" (A. 216a).

As part of the contract, United Continental agreed to fulfill all of A.C.E.'s coal contracts, including all of the contracts previously sold (A. 218a, 219a). Bill Sizemore, General Manager for United Continental in Manchester, Kentucky (A. 212a), testified that United Continental

had 20,000,000 tons of coal under contract (A. 213a). An engineering report regarding United Continental's coal in Eastern Kentucky was admitted into evidence as Defendants' Exhibit "N" (A. 220a).

On July 17, the jury found the Petitioner guilty on all counts. On August 25, 1982 he was sentenced to a total term of imprisonment of ten years and was fined $29,000.00.

A timely appeal was thereafter filed with the United States Court of Appeals for the Third Circuit and was subsequently denied on November 3, 1983. A Petition for Rehearing *in Banc* was denied on November 28, 1983.

REASONS FOR ALLOWING WRIT

I. The Petitioner was deprived of the effective assistance of counsel and of due process of law by the trial court's refusal to grant a reasonable continuance.

The Sixth Amendment right to the assistance of counsel is one of the fundamental guaranties of the Bill of Rights. Moreover, "... the distinction between technical 'representation' by counsel and meaningful 'assistance' of counsel" [*U.S. ex rel. Carey v. Rundle*, 409 F.2d 1210, 1213 (CA 3, 1969)] has long been recognized:

> "A necessary predicate of the concept of effective assistance is the requirement that there be adequate time for counsel to prepare as well as to direct the defense." *Id.* at 1213.

This Court had occasion to speak to this issue in *Ungar v. Sarafite*, 376 U.S. 575, 589, 84 S. Ct. 841, 11 L.Ed.2d 921, 931 (1964):

> "The matter of continuance is traditionally within the discretion of the trial judge, as it is not every denial of a request for more time that violates due process even if the party fails to offer evidence or is compelled to defend without counsel. (cit. om.) *Contrarywise, a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality.* (cit. om.) There are no mechanical tests for deciding whether denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied." (Emphasis added)

Here, the Petitioner made a reasonable and justifiable request for a continuance and specified in detail what more had to be done in preparation for trial. Without stating its reasons,[1] (A. 104a), the court refused to grant the continuance out of what appears to be a "myopic insistence upon expeditiousness".

The motion detailed compelling reasons for the granting of a continuance. On November 10, 1981, a twenty-eight count indictment was returned against eight individuals and two corporations, charging an elaborate and complex nationwide scheme to defraud investors. The indictment alleged conspiracy, mail fraud (seven counts) and wire fraud (twenty counts).

Shortly after the return of the indictment, appearances were entered on the Petitioner's behalf by attorneys David M. Basker and Carl A. Parise. Numerous pretrial motions were thereafter filed and were heard by the court on March 29 and March 30, 1982.

[1] The Third Circuit has stated that ". . . the trial court should indicate on the record the reasons for its denial of a motion for a continuance to facilitate our review of that decision. (cit. om.) *U.S. v. Walden*, 578 F.2d 966, 969 (CA 3, 1978).

On April 19, 1982, Attorney Basker filed a motion for leave to withdraw his appearance. At that time, *both* the government and some of the codefendants stated that they intended to call Attorney Parise as a witness at trial. After a hearing conducted on May 6, the court entered an order permitting both Basker and Parise to withdraw their appearances and requiring the Petitioner to obtain new counsel within ten days.

On May 17 Thomas A. Livingston, Esquire, entered his appearance for both the Petitioner and the American Coal Exchange. At that time trial was scheduled for June 1. On May 20 the court, *sua sponte*, entered an order continuing the trial date from June 1 to June 14.

On June 7 counsel for codefendants Bialy and First Fidelity Financial Corporation filed a Motion for Continuance which was joined in by Defendant Morris and the American Coal Exchange. The Motion stated that counsel was unprepared for trial and would "... be unable to effectively represent his client unless given a reasonable extension of time to prepare" [Paragraph 6 of Motion (A. 52a)].

The Motion noted that since being retained, counsel had reviewed the indictment and had reviewed all pleadings and over four hundred pages of transcript of related civil and administrative proceedings.[2] Counsel also stated that he had numerous meetings with cocounsel and had spent two days in Florida meeting with the Defendant [Paragraph 8 of Motion (A. 52)].

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[2] On March 20, 1981, the United States Postal Service filed a Complaint against Defendants American Coal Exchange and First Fidelity Financial Corporation at P.S. Docket No. 10/168, alleging violations of 39 U.S.C. §3005. At the same time the Postal Service filed a Complaint against the same Defendants in the district court for injunctive relief at Civil Action No. 81-458.

In addition and of critical importance, counsel learned that there were over one hundred sixty potential witnesses, none of whom had yet been interviewed by any defendant [Paragraph 10 of Motion (A. 53a)].

The witnesses referred to were individuals all over the country who had purchased contracts from the Defendants. The heart of the government's case was that these individuals had been induced to purchase the contracts by fraudulent misrepresentations. The Petitioner, on the other hand, contended that the contracts were sold in good faith and that no misrepresentations had been made, and that if any misrepresentations had been made, they were made without his knowledge, consent or authority. In the Motion, counsel therefore stated that he "... believes and therefore avers that many of the witnesses can present exculpatory testimony on the defendant's behalf." [Paragraph 10 of Motion (A. 53a)].

At trial, twenty-three of the customers testified that they were induced to purchase the contracts through fraudulent misrepresentations. Two customers testified for the defense that there were no misrepresentations.

The Motion also noted that the government had seized in excess of six thousand documents from the Defendant [Paragraph 11 of Motion (A. 53a)]. Those documents were available for inspection only at the offices of the Postal Inspectors. In order to facilitate the overwhelming task of reviewing those documents, on June 1 counsel requested that the government return to the Defendants all documents it did not intend to use at trial. The government refused.

After oral argument in chambers,[3] on June 7, the court without explanation, entered an order denying the motion (A. 57a).

The Motion was thereafter renewed orally on June 14 immediately prior to the commencement of trial. Counsel reiterated that he was unable at that time to effectively represent his client and reargued all of the points set forth in the June 7 Motion (A. 92a-102a). The Motion was again denied without explanation (A. 104a).

The Third Circuit has recognized that "a change of counsel close to the date set for trial may under some circumstances warrant a continuance to permit adequate time for preparation of a defense (cit. om.)". *U.S. v. Walden, supra,* at 969. Such was the situation here.

Counsel entered his appearance on May 17, 1982, twenty-eight days prior to the commencement of trial. In a case as complex as this, twenty-eight days must be considered as "close" to the date set for trial. By June 6 counsel knew that he could not be prepared for trial by June 14 and filed the Motion for Continuance, specifying what more would be done in preparation if the Motion was granted.

In the Motion counsel set forth what he had done thus far and what more remained to be done. Because the continuance was denied, counsel started trial without having reviewed most of the six thousand documents seized from the Defendants. The government could easily have facilitated the Petitioner's trial preparation by returning all of the documents it did not intend to use at trial.[4] Its refusal to do so was unreasonable. Counsel

[3] This in chambers proceeding was not transcribed.

[4] The Petitioner estimates that the government used substantially less than one-half of the documents.

needed to review the unused documents to determine if any of them contained exculpatory evidence. The Petitioner reasonably assumed that the documents not used by the government would be inconsistent with its theory of guilt.

During the trial which began on June 14 and ended on July 17, counsel was able to interview a few of the customers. Two of them testified for the defense and emphatically supported the Defendants' position that no misrepresentations were made.[5] [See the testimony of Gibson Reiss (A. 164a-183a) and Robert W. Sutter (A. 183a-208a)]. Unfortunately this testimony was insufficient to counterbalance the testimony of the twenty-three customers called by the government. Had the Defendants been given more time to prepare, it is likely that, of the approximately one hundred thirty customers not called by either side, many more defense witnesses would have been found. Had more customers testified for the defense, it is not difficult to imagine a different verdict.

Putting the Petitioner to trial without giving him a reasonable opportunity to interview the customers and to review the voluminous documents was an abuse of the court's discretion which operated to deprive the Defendant of his rights to the effective assistance of counsel and due process of law. Accordingly, his conviction must be reversed.

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[5] It is interesting to note that the government had interviewed both of these witnesses (A. 179a and 200a-201a); yet the Defendants were never made aware of the existence of this exculpatory evidence. It is not unreasonable to assume that the government had interviews with other customers which were also exculpatory.

II. This Court should establish a procedure to be used by the district courts when a defendant requests a severance and immunity for a codefendant and the codefendant refuses to testify during the *voir dire* except under a grant of immunity.

Since the Third Circuit's decision in *Government of the Virgin Islands v. Smith*, 615 F.2d 964 (CA 3, 1980), the district courts have been increasingly confronted with the issue of defense witness immunity. However, the precise question presented by this Petition has not yet been addressed by any court. It is a question of exceptional importance and merits this Court's consideration so that an appropriate and uniform procedure can be established.

Courts have long recognized "... that the essential task of a criminal trial is to search for truth, and that this search is not furthered by rules which turn the trial into a mere 'poker game' to be won by the most skilled tactitian". *Government of the Virgin Islands v. Smith*, 615 F.2d at 971.

To further the search for truth, the Third Circuit in *Smith* opened "... the door for a non-statutory order of [defense witness] immunity derived from the defendant's due process right to have exculpatory evidence presented to the jury". *Id.* at 964.

Based upon *Smith*, the Petitioner moved orally in the district court for defense witness immunity for codefendants Bialy, Desmond and Walton (A. 145a) and for a severance in order to compel their testimony since none of them intended to testify at trial (A. 147a). After an extended argument, the court denied the motion (A. 160a-163a).

The Third Circuit has established the following "threshhold burden" for defendants requesting defense witness immunity:

> "Similarly, before a court can grant immunity to a defense witness, it must be clear that an application has been made to the district court naming the proposed witness and specifying the particulars of the witness' testimony. In addition, the witness must make a convincing showing sufficient to satisfy the court that the testimony which will be forthcoming is both clearly exculpatory and essential to the defendant's case. Immunity will be denied if the proffered testimony is found to be ambiguous, not clearly exculpatory, cumulative or if it is found to relate only to the credibility of the government's witnesses." *Government of the Virgin Islands v. Smith, supra,* at 972.

There is no question that the Petitioner made an application to the trial court and named the proposed witnesses. Furthermore, those witnesses agreed that if granted immunity, they would testify on the Petitioner's behalf at a separate trial (A. 152a, 153a).

The problem here is that the Petitioner was unable to specify the particulars of the witnesses' testimony. The Petitioner proposed that the Court conduct a separate *voir dire* of each witness concerning the nature and extent of his exculpatory testimony (A. 149a, 151a). The witnesses, however, refused to participate in a *voir dire* unless granted assurance that any statements made during the *voir dire* would not later be used against them (A. 152a, 153a).

The holding of such a *voir dire* has been approved as a proper vehicle for the resolution of this kind of issue:

> "... It would permit the parties and the Court to explore, under oath, the likelihood that the codefendant would, indeed, testify at any severed trial. It might also allow some consideration of the projected testimony's content." *U.S. v. Rosa*, 560 F.2d 149, 156, ftnt. 9 (CA 3, 1977).

While the proposed *voir dire* may have been a proper vehicle for resolving this issue, it is understandable and indeed prudent that the codefendants refused to participate without adequate assurance that their testimony would not later be used against them. Under *Simmons v. U.S.*, 290 U.S. 377, 88 S. Ct. 967, 19 L.Ed.2d 1247 (1968), it would appear that the court had the authority to grant such assurance.

Simmons, however, did not deal with defense witness immunity. It dealt with a defendant's right to testify during a suppression hearing without that testimony being later used against him at trial. Thus, while *Simmons* is analogous, it is not directly on point. Moreover, this writer has been unable to find any case directly on point.

The dilemma faced here by the Petitioner and his three codefendants is apparent. A tension was created between the Petitioner's due process right to present exculpatory testimony and his codefendants' Fifth Amendment privilege not to testify. This tension could and should have been relieved by the granting of immunity to the codefendants for their *voir dire* testimony. The court's unjustified refusal to do so prevented the Petitioner from eliciting the particulars of the wintnesses' testimony.

Indeed, absent the grant of immunity for the limited purpose of conducting the *void dire*, the Fetitioner had

no way of meeting his threshhold burden. Moreover, granting immunity for the limited purpose of conducting the *voir dire* would have in no way trenched upon any governmental interests. The government, in fact, did not object to this proposed procedure.

This Court should take this opportunity to fashion a procedure for dealing with this situation by providing that a witness be granted immunity for the limited purpose of his *voir dire* testimony. Without such a procedure, it is almost impossible for a defendant to meet his threshhold burden when he is seeking immunity for a codefendant.

Respectfully submitted,

STANTON D. LEVENSON
Attorney for Petitioner
1615 Frick Building
Pittsburgh, Pennsylvania 15219
(412) 355-0650

APPENDIX

Exhibit "A"

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
For the Third Circuit

Nos. 82-5542, 82-5610, 82-5634,
and 82-5647/48

UNITED STATES OF AMERICA,

vs.

AMERICAN COAL EXCHANGE, FIRST FIDELITY FINANCIAL CORP., LAWRENCE D. MORRIS, NORMAN B. BIALY, ROBERT WALTON, THOMAS DESMOND, JOHN DOE a/k/a ROBERT JOHNSON, JOHN BIRCH, PHILANDO HILL, AL HEFNER,

Lawrence D. Morris,
Appellant in No. 82-5542.

(D.C. Crim. No. 81-190-03)

Appendix—Exhibit "A".

UNITED STATES OF AMERICA,

vs.

AMERICAN COAL EXCHANGE, FIRST FIDELITY FINANCIAL CORP., LAWRENCE D. MORRIS, NORMAN B. BIALY, ROBERT WALTON, THOMAS DESMOND, JOHN DOE a/k/a ROBERT JOHNSON, JOHN BIRCH, PHILANDO HILL, AL HEFNER,

Norman Bialy,
Appellant in No. 82-5610.

(D.C. Crim. No. 81-190-04)

UNITED STATES OF AMERICA,

vs.

AMERICAN COAL EXCHANGE, FIRST FIDELITY FINANCIAL CORP., LAWRENCE D. MORRIS, NORMAN B. BIALY, ROBERT WALTON, THOMAS DESMOND, JOHN DOE a/k/a ROBERT JOHNSON, JOHN BIRCH, PHILANDO HILL, AL HEFNER,

John Birch,
Appellant in No. 82-5634.

(D.C. Crim. No. 81-190-08)

Appendix—Exhibit "A".

UNITED STATES OF AMERICA,

vs.

AMERICAN COAL EXCHANGE, FIRST FIDELITY FINANCIAL CORP., LAWRENCE D. MORRIS, NORMAN B. BIALY, ROBERT WALTON, THOMAS DESMOND, JOHN DOE a/k/a ROBERT JOHNSON, JOHN BIRCH, PHILANDO HILL, AL HEFNER,

Robert Walton,
Appellant in No. 82-5647.

(D.C. Crim. No. 81-190-05)

UNITED STATES OF AMERICA,

vs.

AMERICAN COAL EXCHANGE, FIRST FIDELITY FINANCIAL CORP., LAWRENCE D. MORRIS, NORMAN B. BIALY, ROBERT WALTON, THOMAS DESMOND, JOHN DOE a/k/a ROBERT JOHNSON, JOHN BIRCH, PHILANDO HILL, AL HEFNER,

Thomas Desmond,
Appellant in No. 82-5648.

(D.C. Crim. No. 81-190-06)

Appendix—Exhibit "A".

Appeal from the United States District Court
for the Western District of Pennsylvania
District Judge: Barron P. McCune

Submitted Under Third Circuit Rule 12(6)
October 31, 1983
Before: ALDISERT, HUNTER, and
WEIS, *Circuit Judges.*

MEMORANDUM OPINION OF THE COURT

ALDISERT, *Circuit Judge.*

The various appellants appeal from judgments of conviction and sentence on mail and wire fraud, and conspiracy to commit those offenses. Following a jury trial, appellants Morris, Bialy, Walton, and Birch were convicted on the conspiracy counts and all of the 19 substantive counts of the original 28 count indictment that went to the jury. Desmond was acquitted of the substantive offenses but was convicted of conspiracy.

Distilled to its essence, seven specific issues were presented by the various defendants in this appeal. First, was the evidence sufficient to sustain the convictions of Walton, Birch, and Desmond? The answer is clearly yes. Walton and Birch made initial contacts with prospective investors, made a full range of false claims concerning the nature of the companies and a coal contract to induce investors to buy the contracts. In some instances Walton and Birch worked as a team with Walton advising an investor that he was busy managing accounts and then

turning the investor over to Birch to close the deal. Walton trained the salesmen, telling one to falsely portray himself to potential clients as a highly educated executive with offices and an extensive research department located on the 57th floor of a skyscraper. The record is replete with misrepresentations. Totally they defrauded 240 investors throughout the United States of approximately 2.5 million dollars by selling them worthless deferred delivery coal contracts. Desmond was present during telephone sales pitches and personally confirmed misrepresentations made to investors. He also played a role in misrepresenting the nature of the American Coal Exchange to investors which, of course, was an integral part of the scheme.

Did the district court err in denying motions for a continuance by appellants' Morris and Bialy? Here the answer is no. They were represented by Carl A. Parise and David M. Basker from November 10, 1981, to May 6, 1982. On May 6 the court permitted Parise and Basker to withdraw from the case on the grounds that Morris and Bialy intended to call Parise as a witness. On May 17, present counsel entered appearances. Three days later the court rescheduled the trial from June 1 to June 14. There was no error because counsel took over the defense approximately four weeks before trial and shortly thereafter were given complete access to documents seized by the government which included all customer files as well as the names, addresses, and phone numbers of individual investors. Additionally, they were provided well before trial with copies of the government's exhibits and with its witness list. Appellant Bialy's counsel himself acknowledged to the trial court that "he never had more cooperation from the . . . United States Attorney."

Appendix—Exhibit "A".

Appellants next argue that a search warrant authorizing the search was defective because of incomplete affidavits. We have examined the records and find no error here.

Morris and Bialy argue that their motion for disclosure of electronic surveillance did not satisfy 18 U.S.C. §3504. We are satisfied with the government's response to this argument.

We are also convinced that the trial court did not err in denying appellant Morris' motion for defense witness immunity and permitting the jury to have a copy of the indictment during deliberations.

Finally, appellants raise certain miscellaneous contentions which are ably answered by the government's brief at 43-45.

Accordingly, the judgment of the district court will be affirmed.

TO THE CLERK:

Please file the foregoing opinion.

ALDISERT
Circuit Judge